Office-Supreme Court, U.S.
FILED
FEB 9 1981
ALEXANDER L. STEVAS,
CLERK

80-1344

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

UNITED STATES OF AMERICA,
RESPONDENT,

v.

TRACEY VIEGAS,
PETITIONER.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

MELVIN RAVECH,
SHERRILL P. CLINE,
RAVECH, ARONSON & SHUMAN, P.C.,
Two Center Plaza,
Boston, Massachusetts 02108.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether a reasonable suspicion was raised when agents of the Drug Enforcement Administration observed one man meet a second man deplaning from Miami, Florida in Boston, Massachusetts, the two men appeared to use the nearby telephone booths, and appeared to be attempting to detect surveillance while walking to the baggage carousel.

2. Whether a reasonable suspicion is sufficient to justify an overnight seizure of a suspect's personal property pending further investigation.

3. Whether the affidavit in support of the search warrant disclosed probable cause to search the defendant's suitcase.

INDEX

Page

Opinions Below..... 1

Jurisdiction..... 2

Questions Presented..... 2

Constitutional Provision Involved. 3

Statement of the Case..... 3

Reasons for Granting the Petition. 12

Conclusion..... 34

Appendix A..... 1a

Appendix B.....15a

Appendix C.....16a

TABLE OF CASES

Aguilar v. Texas, 378 U.S. 108 (1964)....21, 22, 24, 25, 26, 27, 33

Arkansas v. Sanders, 442 U.S. 753 (1979).....18

Berkowitz v. United States, 340 F. 2d 168 (1st Cir. 1965).....18

Dunaway v. New York, 442 U.S. 200 (1979).....20

Grimaldi v. United States, 606 F. 2d 332 (1st Cir. 1979), cert. den. 100 S. Ct. 465 (1979.....22

Mapp v. Warden, 531 F. 2d 1167 (2nd Cir. 1976) 29

Reid v. Georgia, ___U.S.___ 100 S. Ct. 2752, 65, L. Ed. 2d 890 (1980).....9, 10, 11, 12, 13, 15

Rosencranz v. United States, 356 F. 2d 310 (1st Cir. 1966)..... 29, 32

Sgro v. United States, 287 U.S. 206 (1932)..... 22, 28, 33

Spinelli v. United States, 393 U.S. 410 (1969).... 10, 21, 24, 25, 26, 27

Terry v. Ohio, 392 U.S. 1 (1968).....19, 20

United States v. Black, 476 F. 2d 267 (5th Cir. 1973)..... 28

United States v. Bowles, 625 F. 2d 537 (5th Cir. 1980)..... 13

United States v. Chadwick, 433 U.S. 1 (1977)..... 17, 18, 19, 20

United States v. Charest, 602 F. 2d 1015 (1st Cir. 1979)..... 34

United States v. Colon, 559 F. 2d 1380 (5th Cir. 1977)..... 29, 33

United States v. Dauphinee, 538 F. 2d 1 (1st Cir. 1976.. 28

United States v. DiMuro, 540 F. 2d 503 (1st Cir. 1976) Cert. den. 429 U.S. 1038 (1977)..... 30

United States v. Emery, 541 F. 2d 887 (1st Cir. 1976)..... 31

United States v. Evers, 552 F. 2d 1119 (5th Cir. 1977)..... 29, 30

United States v. Forero-Rincon, 626 F. 2d 218 (2nd Cir. 1980).... 13

United States v. Forrest, 434 F. Supp. 1131 (E.D. Pa. 1977) aff'd without opin. 573 F. 2d 1302 (3rd Cir. 1977)..... 29

United States v. Klein, 626 F. 2d 22 (7th Cir. 1980)..... 16

United States v. Mendenhall, ____ U.S. ____, 100 S. Ct. 1870 (1980) 13

United States v. Pappas, 600 F. 2d 300 (1st Cir. 1979)..... 18

United States v. Poulack, 556 F. 2d 83 (1st Cir. 1977) cert. den. 434 U.S. 986 (1977)..... 28

United States v. Robinson, 625 F. 2d 1211 (5th Cir. 1980)..... 13

United States v. Salvucci, 599 F. 2d 1094 (1st Cir. 1979) rev'd on other grounds ____ U.S. ____, 100 S. Ct. ____, 65 L. Ed. 2d 619 (1980).....29, 30, 32

United States v. Van Leeuwen, 397 U.S. 249 (1970).....16, 17

United States v. Watts, 540 F. 2d 1093 (D.C. Cir. 1976)..... 29

United States v. Welebir, 498 F. 2d 346 (4th Cir. 1974)..... 29

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

UNITED STATES OF AMERICA

v.

TRACEY VIEGAS, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The defendant, Tracey Viegas, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, pp. 1a-14a) is not yet reported. The district court did not issue a written opinion.

JURISDICTION

The judgment of the court of appeals (App. B, infra, p. 15a) was entered on January 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a reasonable suspicion was raised when agents of the Drug Enforcement Administration observed one man meet a second man deplaning from Miami, Florida in Boston, Massachusetts, the two men appeared to use the nearby telephone booths, and appeared to be attempting to detect surveillance while walking to the baggage carousel.

2. Whether a reasonable suspicion is sufficient to justify an overnight seizure of a suspect's personal property pending further investigation.

3. Whether the affidavit in support of the search warrant disclosed probable

cause to search the defendant's suitcase.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. On November 7, 1979, at approximately midnight, Mr. Robert Brooks arrived at the Delta Airline terminal at Logan Airport, Boston, Massachusetts. He there inquired where the luggage would arrive from an incoming Miama, Florida flight. This apparently unremarkable inquiry aroused the suspicions of Drug Enforcement Administration Agents Sampson and Lemon. They thus watched him move

his car from the upper parking level to the lower parking level where Mr. Brooks had been told the luggage would be deposited, then while away some extra time in the lounge. (App. A, infra, p. 2a).

Shortly before the flight from Miami was scheduled to arrive, Mr. Brooks, unwittingly accompanied by two Drug Enforcement Administration Agents, proceeded to the arrival gate. He then placed a telephone call, but left the door to the booth open and "was looking up and down the concourse". (Ibid). Soon, Mr. Tracey Viegas, appeared among the deplaning passengers, the two men greeted each other, but apparently did not shake hands, and then proceeded to the telephone booths. The agents testified that neither man placed a call but left the doors open and were "peering out of the phone booths, looking up and down the corridor in each

direction". (Ibid). This testimony was controverted in part by evidence in the form of a telephone bill proving that Mr. Brooks had made two collect calls to his home during the time period in question.

After leaving the telephone booths, the two men, followed by the two agents, proceeded to the baggage claim area. The agents testified that the defendant and his companion were looking behind them as if attempting to detect surveillance. This behavior apparently continued while the defendant and Mr. Brooks waited for the luggage. (Ibid).

Once Mr. Brooks and Mr. Viegas had left the terminal they were stopped by the two agents. (Ibid). Upon inquiry, Mr. Viegas stated that he was returning from Marathon, Florida where he had been visiting his girlfriend and produced

plane tickets and a Massachusetts driver's license, all of which were consistent. (App. A, infra, p. 3a). The agents testified that during the interview, the defendant was visibly nervous in that he paled, shook and perspired. (Ibid).

Mr. Viegas denied consent to search his suitcase. When asked whether he would consent to a search by a detector dog, he allegedly responded, "Okay, get your dog". (Ibid).*

At that point, the agents testified that Mr. Viegas agreed to go to the DEA airport office to locate a detector dog. However, when it developed that a dog would not be available for several hours,

---

*Defendant contends that he responded, "Where's your dog?" He further maintains that he did not agree to go to the DEA airport office, but was guided there by an arm on his elbow.

Mr. Viegas was told he was free to go, but he would have to leave his suitcase. The defendant decided to return home. (Ibid).

At approximately 10:30 a.m. the next day, a detector dog was summoned. He did not respond to the suitcase. (App. C, infra, p. 20a). Also, it was learned that an unnamed informant of an unnamed DEA agent said that Mr. Viegas "had been dealing in cocaine and that during 1978 the CI had purchased quantities of cocaine from Viegas". (App. C, infra, p. 20a). The informant also stated that Viegas brought the cocaine to Massachusetts from Florida. Finally, information "was received by DEA in 1978" that Viegas "was planning" to transport cocaine from Florida to Plymouth, Massachusetts. This information was acquired from a police officer in Plymouth, Massachusetts. (App. C,

infra, p.20a). Based on all the above data, a search warrant was issued for Mr. Viegas' suitcase. Execution of that warrant revealed 290 grams of cocaine.

2. On December 20, 1979, the defendant was charged by indictment in the United States District Court for the District of Massachusetts with possession of cocaine with intent to distribute, in violation of 21 U.S.C. §841(a)(1). The defendant filed a Motion to Suppress the evidence arguing that his Fourth Amendment rights had been violated when he was stopped, when he was detained in the DEA airport office, when his suitcase was detained, and when the search warrant was issued. The Government argued that the Fourth Amendment was not offended by the stop because there was no seizure, and even if there was a seizure, the agents had reasonable

suspicion justifying the intrusion. The Government further argued that the detention of Mr. Viegas and his suitcase were consented to, and if not, the Government's action was reasonable. Finally, the Government maintained the affidavit in support of the search warrant was amply supported by probable cause. The district court issued an order from the bench denying the defendant's motion without opinion.

3. A divided court of appeals affirmed the denial of the motion. The majority declined to determine whether a seizure had occurred ruling that, in any event, "the agents' conduct satisfied the Fourth Amendment's test of reasonableness". (App. A, infra, p. 5a). It further stated that the district court was warranted in finding "articulable grounds for suspicion" which were more than existed in Reid v. Georgia,

____ U.S. ____, 100 S. Ct. 2752, 65, L. Ed. 2d 890 (1980). (App. A, infra, p. 6a, n.5).

The court of appeals did not rule on the legality of the detention of Mr. Viegas, apparently because there was no information gleaned from the detention which contributed to the finding of probable cause in the affidavit for the search warrant. The court did, however, rule that the temporary detention of Mr. Viegas' suitcase need only be supported by reasonable suspicion and not probable cause as urged by the defendant. (Ibid).

Finally, the court held that the information obtained from the unnamed informant satisfied the test of Spinelli v. United States, 393 U.S. 410 (1969). Furthermore, although the data from 1978 had only "slight" probative value, "its corroborative value was more

significant". (App. A, infra, p. 7a). Thus, the warrant affidavit, viewed in its entirety, was sufficient to establish probable cause to search the suitcase.

The dissent focused its attention on the holding of Reid v. Georgia, supra. Based on that case, and the almost indistinguishable facts, the dissent argued there were no "reasonable grounds for suspicion as to justify the policy invasion of defendant's fourth amendment rights". (App. A, infra, p. 8a). Reviewing each factor relied on by the majority, the dissent was not convinced that, individually or cumulatively, the factors added up to reasonable suspicion. It was noted that the agents did not see, or misinterpreted, several of Mr. Brooks' actions. The dissent suggested

> "that DEA agents attempting to fit activities into a drug courier profile may sometimes see things that do not happen

> and fail to see things that do. Observations depend as much on the mind-set of the observer as they do on his eyes." (App. A, infra, p. 12a)

REASONS FOR GRANTING THE PETITION

1. By finding that the Drug Enforcement Administration agents had reasonable suspicion to stop Mr. Viegas, the court of appeals has decided a federal question in direct conflict with the holding in Reid v. Georgia, ____ U.S. ____, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980). That opinion held, on facts similar to the case at bar, that, as a matter of law, there was not reasonable suspicion to stop the petitioner. 65 L. Ed. 2d at 894. The issue is whether the facts in the instant case are sufficiently different to take it out of the ambit of Reid v. Georgia. Petitioner maintains they are not.

The United States Supreme Court first wrestled with the difficult

issue of airport searches in United States v. Mendenhall, ____ U.S. ____, 100 S. Ct. 1870 (1980). The resulting decision, however, has provided little guidance to the lower courts because of the number of opinions rendered. See, United States v. Bowles, 625 F. 2d 537 (5th Cir. 1980); United States v. Robinson, 625 F. 2d 1211 (5th Cir. 1980); United States v. Forero-Rincon, 626 F. 2d 218 (2nd Cir. 1980). One month later, the Supreme Court released a second opinion on the issue of airport searched. Reid v. Georgia, supra. This time the Court assumed a seizure had occurred when the suspect was accosted by the DEA agents, and issued a per curium opinion holding the stop was not supported by reasonable suspicion.

The observations preceding the

stop of both Mr. Reid and Mr. Viegas are similar. In both cases, the defendants arrived from "source" cities in the early morning hours. Mr. Reid pretended he was not with his companion while Mr. Viegas appeared to be looking around the airport. Mr. Reid had no luggage while Mr. Viegas had to wait for a suitcase befitting a tourist. In addition, the court of appeals credited the agents' testimony that when Mr. Viegas met his companion they did not shake hands. (App. A, infra, p. 2a). It was further believed that when Mr. Brooks entered a telephone booth both before and after Mr. Viegas' plane arrived he failed to place a call and instead kept an eye on the concourse. (Ibid).

The dissent urges, as does the petitioner, that whether or not Mr.

Viegas and Mr. Brooks shook hands upon meeting is irrelevant. Furthermore, it was proven that Mr. Brooks did place two collect telephone calls thus crediting the defendant's position, also espoused by the dissent, that Mr. Brooks was merely watching the passersby while making his phone calls. (App. A, infra, p. 12a).

The court of appeals stated in a footnote, "There was considerably greater cause for suspicion here than in Reid v. Georgia, 48 U.S. L.W. 3847 (decided 6/24/80)." (App. A, infra, p. 6a, n.5). Petitioner urges that the difference between Reid v. Georgia and the instant case is without substance. On that basis, the Court should grant a writ of certiorari to correct the erroneous judgment of the court of appeals.

2. The court of appeals held that the overnight detention of Mr. Viegas' suitcase was permissible based on reasonable suspicion that it contained contraband. (App. A, infra, p. 6a). Petitioner maintains that this is a question as yet undecided by the Supreme Court and should be decided so as to prohibit seizure of property except upon probable cause.

The majority opinion based its holding on the case of United States v. Klein, 626 F. 2d 22 (7th Cir. 1980), which held, on very similar facts, that detention of the defendant's suitcase pending further investigation was permissible when reasonable suspicion existed. Id, at 26. Although the Court could find no cases on point, it found the facts in United States v. Van Leeuwen, 397 U.S. 249 (1970)

analogous and thus extended its rationale to the airport seizure situation. In United States v. Van Leeuwen, supra, the Court held that an investigatory detention of a package in the United States Mail was not unreasonable "within the meaning of the Fourth Amendment". Id, at 253.

Petitioner urges that the distinction between a search of luggage, which must be based upon probable cause and documented by a search warrant, except in a few jealously guarded situations, see, United States v. Chadwick, 433 U.S. 1 (1977), and a seizure of luggage is not warranted. The language of the Fourth Amendment does not lend itself to such a distinction. Indeed, even when forefeiture of property is authorized by federal statute, a finding of probable cause is required before

seizure is justified. United States v. Pappas, 600 F. 2d 300, 305 (1st Cir. 1979); Berkowitz v. United States, 340 F. 2d 168 (1st Cir. 1965).

Recently, in two cases involving the warrantless search of luggage, the Supreme Court emphasized the paramount importance of protecting individual privacy interests. United States v. Chadwick, 433 U.S. at 13; Arkansas v. Sanders, 442 U.S. 753 (1979). The Court in each case recognized that the suitcase is a repository for personal items. Id, at 764. It was thus stated that, "the mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment." Id, at 758.

Similarly, it is here urged that a

seizure of personal property, even if reasonable under the circumstances, cannot be sustained unless pursuant to a search warrant, or the seizure falls within one of the exceptions to the warrant requirement. In this manner, the purpose of the Fourth Amendment, to protect the citizens from general warrants and uncontrolled searches and seizures, see, United States v. Chadwick, 433 U.S. at 8, would be effected.

On the contrary, if the rationale of Terry v. Ohio, 392 U.S. 1 (1968) is allowed to be stretched to include a seizure and "investigatory detention" of personal property merely on suspicion of wrongdoing, however reasonable, the door will be opened to ever-greater intrusions on the personal liberties which the Fourth Amendment was designed to protect. See, United States v.

Chadwick, supra. In Dunaway v. New York, 442 U.S. 200 (1979), the Supreme Court refused to extend the narrowly drawn exception to the probable cause requirement allowed in Terry v. Ohio, supra, to encompass an "investigatory detention" of a suspect who was held for questioning on less than probable cause. The Court there stated,

> "Indeed, any 'exception' that would cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." 442 U.S. at 213.

Petitioner therefore urges this Court to rule on this as yet undecided, but fundamental, aspect of Fourth Amendment law.

3. The court of appeals concluded its opinion by holding that the affidavit in support of the search warrant was

supported by probable cause. (App. A, infra, p. 8a). Although discounting the information provided by the Plymouth, Massachusetts police officer because unsufficient under Spinelli v. United States, 393 U.S. 410, 416 (1969), the court found the affidavit as a whole did satisfy the Spinelli test. The court was not persuaded that information between 11 and 23 months old without evidence of continuing enterprise was irretrievably stale, and found it had corroborative, if not probative, value. (App. A, infra, p. 7a). Petitioner maintains that this decision is in conflict with the requirements of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, supra, and is an unacceptable departure from the usual course of this area of criminal law.

It is axiomatic that the affidavit must show a "neutral and detached" magistrate that probable cause exists to believe the sought-after contraband will be found in the place to be searched at the time the warrant is issued. See, Aguilar v. Texas, 378 U.S. at 114; Grimaldi v. United States, 606 F. 2d 332, 337 (1st Cir. 1979), cert. den. 100 S. Ct. 465 (1979); Sgro v. United States, 287 U.S. 206, 210 (1932). Petitioner contends that the affidavit, (App. C, infra, pp. 18a-20a), fails to show probable cause that contraband would be found in Mr. Viegas' suitcase on November 7, 1979.

The first ten paragraphs of the affidavit establish that Mr. Viegas arrived at Logan International Airport on a late night flight from Miami International Airport. He was met by a

friend, Robert Brooks. The two men made phone calls, collected defendant's suitcase, and prepared to leave the terminal. At that point they were stopped and taken to an office. Mr. Viegas consistently refused to consent to the search of his belongings and allegedly showed signs of anxiety prior to "agreeing" to relinquish his suitcase to the DEA agents. It was not argued that these factors amounted to probable cause.* The court of appeals, however, held that this information, in addition to Mr. Viegas' failure to call for his suitcase the next morning and the "corroborative" information provided by the confidential informant was

---

*Note that the court of appeals found that this fact pattern provided only the reasonable suspicion deemed necessary to detain Mr. Viegas's suitcase pending further investigation. (App. A, infra, p. 6a).

sufficient to sustain the search warrant.

The analysis of the court of appeals was precisely that of the lower court in Spinelli v. United States, supra. While reversing the lower court's decision, the Supreme Court ruled that the Government could not bootstrap an otherwise deficient warrant with a tip which was itself inadequate under Aguilar v. Texas, supra

> "We believe, however, that the 'totality of circumstances' approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis.
>
> "The informer's report must first be measured against Aguilar's standards so that its probative value can be assessed. If the tip is found inadequate under Aguilar, the other allegations which corroborate the information contained in the

> hearsay report should then be considered. ...A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which--even when partially corroborated--is not as reliable as one which passes Aguilar's requirements when standing alone." Spinelli v. United States, 393 U.S. at 415 to 416.

An examination of the affidavit in terms of the informant's credibility, however, reveals that the requirements of Aguilar v. Texas, 378 U.S. at 114 to 115, have not been met. There are no facts or circumstances "from which the officer concluded that the informant... was 'credible' or his information reliable'". (Id). Indeed, the affidavit does not even disclose who found the informant to be credible. The magistrate was presented with a bald-faced assertion that "a confidential informant of DEA who had provided information in the past which had been

independently corroborated by DEA Agents..." had provided information about Mr. Viegas. (App. C, infra, p. 20a). This assertion is not that far removed from those found insufficient in Aguilar v. Texas, supra and Spinelli v. United States, supra,* to pass constitutional muster.

The affidavit also fails the second prong of the Aguilar test. The court of appeals found the informant's information was based on his personal observation. (App. A, infra, p. 7a). The crucial bit of information however, "that Viegas brought the cocaine in from Florida", (App. C, infra, p. 9a), is not

---

*The affiant in Aguilar v. Texas stated, "Affiants have received reliable information from a credible person and do believe... ." 378 U.S. at 109. The affiant in Spinelli v. United States stated the FBI "has been informed by a confidential reliable informant... ." 393 U.S. at 414.

supported by an affirmation of personal knowledge or the facts underlying the informant's belief. See, Aguilar v. Texas, 378 U.S. at 114. Indeed, there is nothing to distinguish this assertion from "a casual rumor circulating in the underworld or an accusation based merely on [petitioner's] general reputation." Spinelli v. United States, 393 U.S. at 416.

Here, as in Spinelli v. United States, supra, the independent corroboration of the informant's assertions do not save the tip. The observations of the DEA agents merely corroborated that Mr. Viegas lived in Hyannis, Massachusetts and was returning from Florida. Again, as in Spinelli, corroboration of a noncriminal act does not give rise to probable cause to believe criminal activity is afoot. Spinelli v. United

States, 393 U.S. at 418.*

Moreover, the tip, even if credible, does not speak as of the time the warrant was issued. See, Sgro v. United States, 287 U.S. at 211. Proof of facts which occurred "in 1978", 11 to 23 months prior to the date of issue, no matter how convincing, are not sufficient to sustain a finding of probable cause on November 7, 1979.

Indeed, the First Circuit has itself insisted that the element of recent

---

*The decision of the court of appeals is also in conflict with its own decisions and those of other circuits. See, United States v. Poulack, 556 F. 2d 83 (1st Cir. 1977) cert. den. 434 U.S. 986 (1977)(Informant's information included an admission of crime and several aspects were independently corroborated during weeks of surveillance); United States v. Dauphinee, 538 F. 2d 1 (1st Cir. 1976)(Detailed information provided by informant and significant details corroborated by affiant); United States v. Black, 476 F. 2d 267 (5th Cir. 1973)(Independent corroboration was

(continued on page 29)

observation in a warrant affidavit be strictly observed. In Rosencranz v. United States, 356 F. 2d 310 (1st Cir. 1966), the court struck down an affidavit because of the absence of any averment as to time. Again in United States v. Salvucci, 599 F. 2d 1094 (1st Cir. 1979), reversed on other grounds, ____ U.S.

*(footnote continued)

critical factor); United States v. Watts, 540 F. 2d 1093 (D.C. Cir., 1976)(Informant currently working for narcotic squad); United States v. Welebir, 498 F. 2d 346 (4th Cir. 1974)(Several informants provided consistent information); Mapp v. Warden, 531 F. 2d 1167 (2nd Cir. 1976)(Independent corroboration crucial); United States v. Forrest, 434 F. Supp. 1131 (E.D. Pa. 1977) affirmed without opinion 573 F. 2d 1302 (3rd Cir. 1977) (Informant provided correct information 5 times in 5 months and independent corroboration of facts); United States v. Evers, 552 F. 2d 1119 (5th Cir. 1977) (Informant proved reliable during past six months and facts independently corroborated); United States v. Colon, 599 F. 2d 1380 (5th Cir. 1977)(No probable cause found when tip not based on personal knowledge and contained no details).

____, 100 S. Ct. ____, 65 L. Ed. 2d 619 (1980), the court found the undated tip fatal to the affidavit. In both these cases, the flaw was found crucial despite evidence of a continuing and current investigation. Clearly, if undated information is insufficient, stale information meets the same downfall, unless there is evidence of a continuing enterprise.

There is no evidence from which a magistrate could find that the defendant was conducting a continuous interprise in 1978, much less that the enterprise continued from any one of 12 months in 1978 until November 1979. See, e.g., United States v. Evers, 552 F. 2d 1119 (5th Cir. 1977); United States v. DiMuro, 540 F. 2d 503 (1st Cir. 1976) cert. den. 429 U.S. 1038 (1977) (evidence supported finding of contin-

uous enterprise). The tip does not indicate that Mr. Viegas "brought" cocaine from Florida more than once, nor that the informant "had observed" cocaine or "had purchased" cocaine on more than one occasion. The tip fails to indicate when, where, or under what circumstances these activities took place.

Reference to the Plymouth police officer does not rescue the affidavit. Even allowing for the "presumption of reliability [accorded] to the information provided by government agents", United States v. Emery, 541 F. 2d 887, 889 (1st Cir. 1976), there is nothing the officer said from which a magistrate could conclude that on November 7, 1979 Viegas had contraband in his suitcase. The detective's information that Viegas "was planning to transport... cocaine from Florida" is without a

reference to time. The Court held in United States v. Salvucci, 599 F. 2d at 1096 that "[t]he absence of any reasonably specific averments as to...time is fatal to the warrant.*

The affiant says that the detective's information was conveyed to the DEA in 1978, 10 to 23 months prior to the issuance of the warrant. However the phrase "was planning" is not tied to 1978 and does not indicate whether defendant "was planning" the activity for the past, present, or future. As stated in Rosencranz v. United States, 356 F. 2d at 317,

> "It is one thing to expect the magistrate to give a common-sense reading to facts set forth

---

*The court of appeals, discounted the information provided by the police officer because it did not appear to be based on personal information. (App. A, infra, p. 7a).

> and to draw inferences from them. It is quite another thing to expect the magistrate to reach for external facts and to build inference upon inference in order to create a reasonable basis for his belief that a crime is presently being committed."

It is evident, therefore, that the tip, even if sufficient under Aguilar v. Texas, supra, fails to satisfy the time element under Sgro v. United States, supra.

Finally, nowhere in the affidavit is there mentioned a nexus between the sought-after contraband and the seized suitcase. As in United States v. Colon, 559 F. 2d 1380 (5th Cir. 1977), the affidavit may show that the suspect is likely to have contraband secreted somewhere, but it must more definitely appear on the face of the affidavit that there is probable cause to believe that contraband will be in the place to be searched. See, Aguilar v. Texas, 378

U.S. at 114. Again, the First Circuit has recently found the failure to show a nexus between the contraband and the place to be searched was fatal to the affidavit. United States v. Charest, 602 F. 2d 1015 (1st Cir. 1979).

In sum, the warrant affidavit is devoid of probable cause. The holding of the court of appeals to the contrary is in conflict with the controlling decisions of the Supreme Court and is such an unusual departure from the normal course of judicial proceeding as to justify the Supreme Court's power of supervision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Melvin Ravech and
Sherrill P. Cline

United States Court of Appeals
For the First Circuit

No. 80-1233
80-1361

UNITED STATES OF AMERICA,

PLAINTIFF, APPELLEE,

v.

TRACEY VIEGAS,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOSEPH L. TAURO, *U.S. District Judge*]

Before
ALDRICH, CAMPBELL and BOWNES,
Circuit Judges.

Sherrill P. Cline, with whom *Ravech, Aronson & Shuman, P.C.* was on brief, for appellant.

John H. LaChance, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, and *Walter B. Prince*, Assistant United States Attorney, were on brief for appelee.

January 8, 1981

ALDRICH, *Senior Circuit Judge*. At 1:00 A.M. on November 7, 1979, defendant Viegas arrived at Logan Airport in Boston from Florida with no apparent cloud over him. Later that day his suitcase, which he was required to leave behind, was opened and found to contain 290 grams of cocaine, for the possession of which he now stands convicted. Our question, procedurally presented by two appeals, is whether the court erred in denying (without findings, *United States* v. *Payton*, 1 Cir., 1980, 615 F.2d 922) his motion to suppress.

The evidence warranted the following. At midnight two special agents of the Drug Enforcement Administration had observed one Brooks inquire at the Delta Airlines ticket counter where bags from Flight 488 from Miami would appear. Miami is a recognized cocaine source. After being directed to the carousels on the lower level he drove his car from the upper level and parked by the lower level and returned to the lounge. Later Brooks proceeded to the appropriate gate and appeared to place a phone call. While talking he kept the booth door open and "was looking up and down the concourse." Later he stood where deplaning passengers would pass, and when defendant arrived met, but did not shake hands with him. Both men then entered adjoining phone booths. Although it later developed that Brooks placed a collect call to his residence, the agents testified that neither man put any coins in the phones.[1] Both kept their doors open and were "peering out of the phone booths, looking up and down the corridor in each direction" and appeared to be talking to each other. An agent testified that this action was "consistent with activity that is displayed by drug couriers . . . to identify surveillance."

Brooks' original behavior directed the agents' attention to Viegas, and the combined activity excited their suspicions sufficiently for them to follow them down to the carousel. On this trip Brooks and defendant, alternately, turned and looked behind them five or six times. While waiting for the luggage they, again, "were constantly looking around."

When Viegas obtained his bag, both started towards the parking lot. The agents joined them as they walked, one saying to defendant, essentially, "Pardon me, sir, I am a federal narcotics agent, and I'd like to talk to you a moment," and

[1] It may be said for the agents that their observation was not blatantly faulted by the record evidence that Brooks did make a call, since that call was collect. They might easily overlook the single coin initially inserted to reach the operator. Viegas did not testify. There is no evidence that he made any call.

displayed a badge. The agents denied that they used the word "stop," but conceded they expected the men to stop. The men did stop. Without voicing any objection, defendant answered where he had come from; why he had gone there (to visit a girl friend); proffered his ticket stub, and when asked for identification, handed over his driver's license. All were consistent.

The agent then asked Viegas if he had drugs in his bag, and he replied in the negative. During this exchange perspiration appeared on his brow, although it was a cold night; he paled and his hand shook. An agent told Viegas that the DEA had received a call from Miami regarding someone seen there matching his description and valise. This was untrue.[2] Asked if he would open his bag, but told that he need not, defendant refused. Asked if he would permit a detector dog sniff, he said, "Okay, get your dog." Defendant was then asked if he would go to the office, and he said, "Yes." When it developed that no dog was available, he was told he was free to leave, but that the bag would be detained. He departed, leaving his bag, for which a warrant was subsequently obtained.

We are presented with two factual questions: whether defendant was "seized," viz., was, at any point, not free to leave, which would put a different character of the voluntariness of his behavior, and whether, if he was seized, the agents had reasonable grounds for suspicion, which would put their conduct in the clear in any event. Both parties recognize that the test, in each instance, is how the objective facts would appear to a reasonable person, e.g., *United States* v. *Mendenhall*, 1980, U.S. , 48 U.S.L.W. 4575, 4578 (opinion of Stewart, J.), 4582 n.3 (White, J., dissenting); *United States* v. *Wylie*, D.C.Cir., 1977, 569 F.2d 62, *cert. denied*, 435 U.S. 944, but devote much of their briefs to subjective

[2] This may be thought to diminish, but it could not eliminate (since defendant knew he carried no valise, having checked it through from another point), the significance of his anxious demeanor during questioning.

argument. Thus defendant claims that seizure is established if the agents' actual reason for questioning him was suspicion of criminal activity. This is incorrect. *United States* v. *Vargas*, 1 Cir., (9/24/80) F.2d n.10. Alternatively, the government claims it is disproved if the agents' intent, though unexpressed, was at all times to allow defendant to leave whenever he wished. This, too, is incorrect. Absent any direct evidence, the question is what should defendant, objectively speaking, reasonably have believed.

A "seizure" of the person has occurred, and Fourth Amendment rights arise, when "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen" such that he is not free to walk away. *Terry* v. *Ohio*, 1968, 392 U.S. 1, 16, 19 n.16. This determination is not always an easy one, and particularly in the context of a polite stop by an investigative officer the question may be "extremely close." *United States* v. *Mendenhall*, ante, at 4580 n.1 (Powell, J., concurring); *see United States* v. *Wylie*, ante, 569 F.2d at 73 (Robinson, J., dissenting in part). Where there is acquiescence to an officer who has flashed his badge and requested an interview, there may be subtle questions concerning the individual's capacity to understand his rights and even his desire to avoid incurring wrath or further suspicion. "Many people at bottom will think twice before spurning an importuning policeman." *United States* v. *Wylie*, ante, 569 F.2d at 73 (Robinson, J., dissenting in part). On the other hand, we think the district court's view, that there is no difference between being asked to stop, and the posing of a question which the agent believes may result in a stop, is over-simplistic. A person merely asked for directions may well be expected to stop, but he would hardly regard it as a seizure.

We need not determine, however, whether, or when,[3]

[3] The bases for suspicion, and hence for detaining defendant's suitcase, were all obtained prior to the retaining of his license during the walk to the office, a possible watershed point in the seizure question. *Cf. Dunaway* v. *New York*, 1979, 442 U.S. 200.

defendant's person was seized, for even assuming this to have occurred at the initial contact, we think the agents' conduct satisfied the Fourth Amendment's test of reasonableness. *See United States* v. *Brignoni-Ponce*, 1975, 422 U.S. 873, 878. Whether a particular police action is reasonable "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 1979, 440 U.S. 648, 654 and cases cited. This latter, in turn, depends upon the officer's ability "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, ante, 392 U.S. at 21. In determining which inferences are rational, due credit must be given to the experience and expertise of the officers. *Mendenhall*, ante, 48 U.S.L.W. at 4581 (Powell, J., concurring); *Brown* v. *Texas*, 1969, 443 U.S. 47, 52 n.2; *Brignoni-Ponce*, ante, 422 U.S. at 885.

The facts before the agents, viewed in their entirety,[4] adequately justified the initial inquiry. There was no extended detention, no indication that defendant was in a particular hurry, and no search of his person or (initially) of his belongings. The slight intrusion of this encounter was supported by the pair's evasive actions in the airport, viewed in the light of defendant's arrival from a known distribution center. It is no answer to say, as does defendant, that his actions were "consistent with innocent behavior." *See United States* v. *McCaleb*, 6 Cir., 1977, 552 F.2d 717, 720. "It must be rare indeed that an officer observes behavior consistent only with guilt and incapable of innocent interpretation." *United States* v. *Price*, 2 Cir., 1979, 599 F.2d 494, 502; *see Terry*, ante, 392 U.S. at

[4] The dissent "consider[s] each factor in turn." We may agree that some were of little consequence. However, a picture may be composed of "a series of acts, each of them perhaps innocent in itself, but which when taken together warranted further investigation." *Terry* v. *Ohio*, ante, 392 U.S. at 22.

22, 23. We are concerned only with reasonable, articulable grounds for suspicion, and the district court was warranted in finding them present here.[5]

Defendant next challenges the detention of his suitcase, declaring it a "warrantless seizure [which] must be justified by an exception to the fourth amendment's warrant requirement." All agree that for the agents to open the suitcase required probable cause and, absent an exception, a warrant. The same rule does not apply, however, to a temporary detention pending investigation. *United States* v. *VanLeeuwen*, 1970, 397 U.S. 249; *United States* v. *Klein*, 7 Cir., 1980, 626 F.2d 22, 25-26. Although defendant was doubtless inconvenienced by the detention of his luggage (though less so than if he were going away rather than returning home), the impact on his reasonable expectation of privacy, *Katz* v. *United States*, 1967, 389 U.S. 347, 361 (Harlan, J., concurring), in no way compares with an actual search of the contents. *United States* v. *Chadwick*, 1977, 433 U.S. 1, 13 & n.8. Rather than probable cause, such a detention is governed by the same standard as a temporary detention of the person, *i.e.*, reasonable suspicion. The various behavior information already before the agents satisfied this test.

Defendant's final complaint is that the warrant to search his luggage was not supported by probable cause. The affidavit in support recited the above facts, and some others. Defendant, although told he could call for his valise, had not done so.[6]

---

[5] There was considerably greater cause for suspicion here than in *Reid* v. *Georgia*, 48 U.S.L.W. 3847 (decided 6/24/80). In particular, defendant's and Brooks' frequent glances over their shoulders at no one in particular (Reid was looking at a man who had exited the same plane and later joined him), and their actions in the telephone booths, would reasonably suggest attempted detection, and evasion, of surveillance.

[6] How suspicious that was, however, depends on what time the affidavit was made out, which did not appear.

More significantly, a check of the files revealed that a confidential informant had told the DEA that defendant had been dealing in cocaine; that in 1978 the informant had observed defendant with large quantities of same and had purchased some from him; and that defendant brought the cocaine in from Florida. Other information from the same source had been independently corroborated in the past.[7] We hold that the affidavit met the two-pronged test of *Spinelli* v. *United States*, 1969, 393 U.S. 410. First, the source was apparently reliable. Second, the information was based on the personal observations of the informant, as duly recited in the affidavit. Defendant argues that these observations, being a year old, were "stale," insufficient "to justify a finding of probable cause *at that time*." *Sgro* v. *United States*, 1932, 287 U.S. 206, 210 (emphasis added). He forgets that although "a warrant's validity depends in part on 'the proximity or remoteness of the events observed,' nevertheless the determination of timeliness as an element in probable cause must be by the circumstances of each case." *United States* v. *DiMuro*, 1 Cir., 1976, 540 F.2d 503, 516, *cert. denied*, 429 U.S. 1038; *see United States* v. *Dauphinee*, 1 Cir., 1976, 538 F.2d 1, 5. Obviously, the year-old observation did not, by itself, establish probable cause that defendant was carrying cocaine in the airport. If its probative value was slight, however, its corroborative value was more significant. In this regard it is crucial that the agents received this information only after their contact with defendant; their initial observations and deductions were not in-

[7] We are inclined to discount the affidavit's further recital that a police detective had reported in 1978 that defendant was planning to transport cocaine from Florida to Massachusetts. Although credit must be given for the source, we assume that this was not first hand information. The affidavit gives no details, and none of the underlying circumstances, from which the officer reached this conclusion. *See Spinelli* v. *United States*, 1969, 393 U.S. 410, 416; *Aguilar* v. *Texas*, 1964, 378 U.S. 108, 113. *But see United States* v. *Harris*, 1971, 403 U.S. 573, 580-83 (plurality opinion of Burger, C.J.)

fluenced by it. The cumulative effect was to establish probable cause to search defendant's bag.

This case presents the common picture of "a proper progression of escalating responses to circumstances which generated a mounting degree of suspicion." *United States* v. *Wylie*, ante, 569 F.2d at 66; *see Terry*, ante, 392 U.S. at 10. We hold the court warranted in denying defendant's motion to suppress.

Affirmed.

BOWNES, *Circuit Judge* (dissenting). Although the question of whether and when a seizure occurred is not without difficulty, I accept the majority's assumption that a seizure occurred at the initial contact. I do not agree, however, that at that time there were such reasonable grounds for suspicion as to justify the police invasion of defendant's fourth amendment rights.

The majority opinion sets forth correctly, for the most part, the principles and approach that apply to a case of this type. It, however, relegates to a footnote and then dismisses with a cavalier conclusory statement the case which in my opinion is clearly controlling. *Reid* v. *Georgia*, 48 U.S.L.W. 3487 (June 30, 1980). In both *Reid* and the instant case, it was assumed, without deciding, that the initial questioning constituted a seizure. The issues are therefore identical: whether the agents' actions were justified by articulable and reasonable grounds for suspicion.

The facts of *Reid* as set forth in the opinion are as follows:

> The petitioner arrived at the Atlanta Airport on a commercial airline flight from Fort Lauderdale, Fla., in the early morning hours of August 14, 1978. The passengers left the plane in a single file and proceeded through the concourse. The petitioner was observed by an agent of the DEA, who was in the airport for the purpose of

uncovering illicit commerce in narcotics. Separated from the petitioner by several persons was another man, who carried a shoulder bag like the one the petitioner carried. As they proceeded through the concourse past the baggage claim area, the petitioner occasionally looked backward in the direction of the second man. When they reached the main lobby of the terminal, the second man caught up with the petitioner and spoke briefly with him. They then left the terminal building together.

The DEA agent approached them outside of the building, identified himself as a federal narcotics agent, and asked them to show him their airline ticket stubs and identification, which they did. The airline tickets had been purchased with the petitioner's credit card and indicated that the men had stayed in Fort Lauderdale only one day. According to the agent's testimony, the men appeared nervous during the encounter. The agent then asked them if they would agree to return to the terminal and to consent to a search of their persons and their shoulder bags. The agent testified that the petitioner nodded his head affirmatively, and that the other responded, "Yeh, okay." As the three of them entered the terminal, however, the petitioner began to run and before he was apprehended. abandoned his shoulder bag. The bag. when recovered, was found to contain cocaine.

Reid v. *Georgia*, 48 U.S.L.W. 3847 (June 30, 1980). The factors triggering DEA action, remarkably similar in kind to those present in the instant case, were

that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were travelling together, and (4) they apparently had no luggage other than their shoulder bags.

Id. at 3848. In vacating the judgment of the Georgia Court of Appeals, the Supreme Court concluded that

> the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances. Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse related to their particular conduct. The other circumstances describe a very large category of presumably innocent travellers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure. Nor can we agree, on this record, that the manner in which the petitioner and his companion walked through the airport reasonably could have led the agent to suspect them of wrongdoing. Although there there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot, see Terry v. Ohio, supra, at 27-28, this is not such a case. The agent's belief that the petitioner and his companion were attempting to conceal the fact that they were travelling together, a belief that was more an "inchoate and unparticularized suspicion or 'hunch,' " id., at 27, than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.

Id. at 3848.

Although I accept the facts as set forth by the majority in the instant case,[1] I cannot in view of *Reid* concur in the inferences drawn. The salient facts in the instant case are: (1) the defendant arrived from Miami, a recognized source of cocaine;

[1] I also recognize that without the benefit of findings of fact by the district court its denial of the motion to suppress is to be upheld if any reasonable view of the evidence supports it. *United States* v. *Payton*, 615 F.2d 922, 923 (1st Cir. 1980).

(2) the defendant's friend, Brooks, asked where the baggage of the Miami flight could be retrieved and, after moving his car to a parking lot adjacent to the baggage area, went to the lounge and had a couple of drinks while waiting for the plane; (3) Brooks scanned the concourse while appearing to make a telephone call; (4) the agents testified Brooks did not shake hands with the defendant when he met him; (5) the defendant and Brooks, the agents testified, entered adjacent phone booths and neither put coins into the phones; (6) on the way to the baggage carousel and while waiting for the luggage, Brooks and defendant were "constantly looking around"; and (7) the defendant appeared anxious and nervous when the agents questioned him.

I consider each factor in turn. That Viegas arrived from Miami, a city known to be a drug source, is as tenuous a reason to suspect him of criminal activity as it was in *Reid*. Such a circumstance, "describe[s] a very large category of presumably innocent travellers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." *Id.* at 3848. Further, I find it difficult to fathom why Brooks' inquiry about the location of the baggage depository should lead the agents to focus attention on him. Brooks' question could be expected from anyone meeting an incoming flight. That Brooks then drove his car from the upper level in the parking garage to the parking lot adjacent to the baggage area indicated nothing more except a desire not to have to carry luggage any further than necessary. The fact that Brooks returned to the lounge after reparking his car is also without significance. It is subsequent to this that the activities which have been construed to be suspicious commence. Brooks went to the gate and in the words of the majority "appeared" to place a phone call. During the time he was in the booth, he kept the door open and looked up and down the concourse. The inference is that he used the phone booth only for the purpose of detecting

surveillance. He could, of course, have been telephoning while, at the same time, keeping a watchful eye for the arriving passengers from Miami. My brethren make a point of the fact that when Brooks met the defendant he did not shake hands with him; in the absence of any explanation of the significance of this, I fail to appreciate its relevance. This observation of the agents, it should be noted, was contradicted by Brooks and, sometimes, these agents did not see things as they actually happened.

After the defendant and Brooks met, both men went into adjoining phone booths. The agents were positive that neither put any coins into the phones. Brooks proved through telephone records that he did call his home collect. My brethren explain the agents' mistake with the rationale that, because the call was collect, they could easily have missed seeing the coin inserted into the phone. I agree that even trained observers, as these agents supposedly were, make mistakes. But it is not for this court to provide justification for errors in observation of witnesses. I note parenthetically that if the majority were to consider all reasonable explanations for the agents' mistake, it should have recognized that DEA agents attempting to fit activities into a drug courier profile may sometimes see things that do not happen and fail to see things that do. Observations depend as much on the mind-set of the observer as they do on his eyes. This is not so much a criticism as it is a recognition of the foibles of the human condition to which we are all subject — an awareness which should make us ever more vigilant before sanctioning encroachments on personal freedom.

Although not specifically stated, it is clear that my brethren's assessment of reasonable suspicion is based mainly on the phone booth activities of Brooks and defendant. And, as they implicitly recognize, these were equally consistent with innocent behavior. I am not as willing as my brethren to allow actions consistent with innocent behavior to be transformed

into suspicious criminal activity on the say-so of a police observer, no matter how well trained he may be.[2] The sanctioning of an intrusion of a constitutionally protected liberty should require more than the judgment call of the police.

That Viegas and Brooks were "constantly" looking around while going to the baggage carousel and waiting for defendant's luggage could, I agree, arouse some questions. But it is behavior that is similar to that which in *Reid* was not thought grounds for reasonable suspicion. In *Reid*, "[o]f the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse related to their particular conduct." *Id.* at 3848. I fail to understand why the quantum of suspicion should be greater here than in *Reid*, as the majority argues, because Brooks and defendant glanced over their shoulder at no one in particular, whereas Reid was looking at one person.

There was certainly nothing suspicious in the answers that that defendant gave to the questions asked by the agents. And the license identification was, unlike the situation in *Mendenhall*, consistent with the name on the airline ticket.

There are two problems that I have with my brethren's recitation of defendant's physiological reactions when asked by the agents if he had drugs in his bag. The first is the failure to criticize, even impliedly, the fact that the agents deliber-

---

[2] *United States* v. *McCaleb*, 552 F.2d 717 (6th Cir. 1977), does not stand for the proposition, as the majority opinion implies at p. 5, that the fact that defendant's actions were consistent with innocent behavior is of no consequence. The court in *McCaleb* found that there were no specific and articulable facts justifying an investigatory stop and noted in arriving at this conclusion: "The activities of the appellants in this case observed by DEA agents, were consistent with innocent behavior." *Id.* at 720.

I disagree with the reasoning and conclusions of *United States* v. *Price*, 599 F.2d 494 (2d Cir. 1979), as to that portion of the opinion dealing with grounds for reasonable suspicion. It must also be noted that *Price* was decided before *Reid* v. *Georgia*.

ately lied to defendant during their questioning of him. I do not subscribe to the view that, even when combating something so insidious as drug traffic, the ends justify the means. More to the point, however, defendant's physical manifestations could not be considered on the question of whether there were reasonable grounds for suspecting him of criminal activity. The majority opinion is based on the assumption that defendant's person was seized at the initial contact. The defendant's reactions to the agent's question, like Reid's dropping of his bag and running, are not relevant to the inquiry.

The only factual difference between this case and *Reid* is the phone booth activities of Brooks and defendant. I realize that, as *Reid* and *Mendenhall* illustrate, the result in this kind of a case mainly depends on where the court decides to draw the line. I am sure that the apprehension of drug couriers would markedly increase if the luggage of all passengers from a known "source city" were searched, or even if the search were restricted to those who were met at the plane and then used the telephone. The police, of course, have a duty to combat the terrible drug problem that besets our society. It is the court's duty, however, to preserve inviolate our constitutionally protected rights and liberties. Although, as the majority emphasized, the police intrusion here was slight, it was, in my opinion, unjustified and unconstitutional. I would reverse the denial of the motion to suppress.

United States Court of Appeals
For the First Circuit

No. 80-1233 &
80-1361.

UNITED STATES OF AMERICA,
APPELLEE,

v.

TRACEY VIEGAS,
DEFENDANT, APPELLANT.

Judgment

Entered: January 8, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment and order of the district court are affirmed.

By the Court

/s/ Dana H. Gallup
Clerk.

United States District Court for the District of Massachusetts

---

Magistrate's Docket No. ____

United States of America

Case No. ____

vs.

One brownish-rust colored Atlantic Brand suitcase made of leather or vinyl, 17.5'' high, 23.5'' wide, and 7.5'' thick, with a sea horse emblem attached to the carrying handle bearing an Air Florida baggage claim check attached.

AFFIDAVIT FOR SEARCH WARRANT

BEFORE Joyce London Alexander, Boston, Massachusetts 02109.

The undersigned being duly sworn deposes and says:

That he has reason to believe that in the above-described suitcase, Boston in the District of Massachusetts there is now being concealed certain property, namely cocaine a Schedule II Controlled Substance, dilutants, books, papers, documents, United States Currency and other drug related paraphernalia which are being kept concealed in said suitcase; in violation of Title 21, United States Code, Section 841(a)(1); and 844, which are evidence of the commission of a crime in violation of Title 21, United States Code, Sections 841(a)(1); and 844.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: See the attached Affidavit.

s/ _____
ROBERT SAMPSON
Special Agent, Drug Enforcement Administration

Sworn to before me, and subscribed in my presence, November 7, 1979.

s/ _____
JOYCE LONDON ALEXANDER

AFFIDAVIT

I, Robert M. Sampson, state that I am a Special Agent for the Drug Enforcement Administration and have been for the past fourteen years. I am presently assigned to Logan Airport.

On November 6, 1979 at approximately 11:58 P.M. I observed an individual later identified as Robert Brooks of Hyannis, Mass. approach the Delta Airlines ticket counter and inquire of a ticket agent where the bags from flight 488 from Miami, Ft. Lauderdale came in. He was informed that when the plane landed they would appear on the carousel on the lower level.

I observed Brooks leave the terminal area and drive to the lower level and park. He then entered the baggage claim area where he remained for a few moments, then walked to the upper level of the terminal and went into the lounge.

At approximately 1:00 A.M., on November 7, 1979 I observed Brooks walk to the vicinity of Delta Airlines Gate 32 where flight 488 was scheduled to arrive. He went to a public phone booth and placed a call. While placing the call, he was looking around nervously, peering out of the booth. As the passengers arrived on Flight 488 he came out of the phone booth and walked to the gate area and met with an individual subsequently identified as Tracy W. Viegas, of Hyannis.

Both individuals proceeded to separate phone booths and gave the appearance of making telephone calls. Both individuals kept the phone booths doors open and continually leaned out of the phone booths looking up and down the corridor. This behavior in my 14 years' experience as a DEA Agent is consistent with attempting to identify surveillance activity.

After several minutes they each left their respective phone booths simultaneously and proceeded to the Delta Baggage Claim area on the lower level.

The two individuals appeared to be conversing and were constantly looking around behind them which is, again, consistent with identifying activity.

Upon their arriving at the baggage area, I observed Viegas retrieve a medium sized brown suitcase from the flight 488 baggage carousel and with Brooks head hurriedly for the doors to the terminal.

I followed them out the doors, stopped them and identified myself as a DEA Agent and inquired as to his (Viegas) identity and his travel origination point. At this point, I observed that Viegas appeared to become very nervous, his hand shook, and I observed beads of sweat form on his forehead. He stated that he had come from Marathon in the Florida Keys through Miami, to Boston. I asked the purpose of his trip and he stated he had been visiting a female friend, that he often visited. He said he lived in Hyannis, Mass. He produced a Mass. Driver's license in the name of Tracy W. Viegas. I asked if there were drugs in the bag and he stated No. I asked if he would consent to opening the bag for us and he declined. SA Lemon explained that he did not have to do so. Viegas asked the alternatives and it was explained to him that the U.S. Attorney's Office would be contacted relative to obtaining a search warrant and a detector dog would be summoned to sniff the bag for contraband.

He was asked to accompany me to the airport office and to wait for the dog and he agreed, and he went to the Office. During this conversation, Viegas became ashen white and sweated more profusely. As the dog was not immediately available, Viegas was told that he could either wait or leave the bag there. Viegas agreed to leave the bag there and to contact DEA the next day about its return. He was given a receipt for the bag and two airline tickets.

Viegas and Brooks then left the area at approximately 1:30 A.M. Viegas was given my telephone number to call relative

to reclaiming his suitcase. As of this affidavit he has not contacted me or DEA, Boston. Efforts to contact Viegas at the number given to me by him have been unsuccessful.

A check was run on Tracy Viegas and it was discovered that a confidential informant of DEA who had provided information in the past which had been independently corroborated by DEA Agents had provided DEA with information that an individual named Tracy Viegas of Hyannis had been dealing in cocaine and that during 1978 the CI had purchased quantities of cocaine from Viegas.

The CI also stated that it had observed Viegas in 1978 with large quantities of cocaine and that Viegas brought the cocaine in from Florida.

Further information was received by DEA in 1978 from a detective William Curtis of Plymouth, Mass. Police Department that Viegas was planning to transport 5 to 7 kilos of cocaine from Florida to Plymouth, Massachusetts.

At approximately 10:30 A.M., the detector dog "Blackie" was introduced to the bag with negative results, however, I was informed by the dog's handler, Paul Thomas, that the dog was ill and that any negative results would be questionable.

Based on the foregoing information, my experience as a DEA Agent, DEA intelligence on Viegas and information from DEA Miami that Marathon Florida Airport is a primary entry point for the importation of cocaine from South America, I have probable cause to believe that Viegas' suitcase contains quantities of cocaine, paraphernalia, & cutting material.

s/ _____
ROBERT SAMPSON
Special Agent
Drug Enforcement Administration

Subscribed and sworn to before me this day of November, 1979.

s/ _____
UNITED STATES MAGISTRATE

United States District Court for the District of Massachusetts

Docket No. ____

United States of America

Case No. ____

vs.

One brownish-rust colored Atlantic Brand suitcase made of leather or vinyl, 17.5" high, 23.5" wide, and 7.5" thick, with a sea horse emblem attached to the carrying handle bearing an Air Florida baggage claim check attached.

SEARCH WARRANT

To HON. JOYCE LONDON ALEXANDER, United States Magistrate, Boston, Mass. 02109

Affidavit having been made before me by Special Agent Robert Sampson, Drug Enforcement Administration, Boston Mass. that he has reason to believe that in the above-described suitcase, Boston in the District of Massachusetts there is now being concealed certain property, namely cocaine a Schedule II Controlled Substance, dilutants, books, papers, documents, United States Currency and other drug related paraphernalia which are being kept concealed in said suitcase; in violation of Title 21, United States Code, § 841(a)(1), and Section 844, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person

or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of ten (10) days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search in the daytime (6:00 A.M. to 10:00 P.M.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before JOYCE LONDON ALEXANDER as required by law.

Dated this 7th day of November, 1979.

s/_____

FIL
APR 14
ALEXANDER
CLER

No. 80-1344

In the Supreme Court of the United States

OCTOBER TERM, 1980

TRACEY VIEGAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOHN F. DEPUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner was unlawfully seized when he was briefly questioned by federal narcotics agents.

2. Whether petitioner's Fourth Amendment rights were violated when DEA agents detained his suitcase pending the arrival of a detection dog because they reasonably suspected that the suitcase contained narcotics.

3. Whether the affidavit supporting the issuance of a search warrant established probable cause.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Aguilar v. *Texas*, 378 U.S. 108 10

Arkansas v. *Sanders*, 442 U.S. 753 9

Brown v. *Texas*, 443 U.S. 47 5

Dunaway v. *New York*, 442 U.S. 200 9

Michigan v. *Summers*, No. 79-1794 (argued Feb. 25, 1981) 9

Reid v. *Georgia*, No. 79-448 (June 30, 1980) 6

Sgro v. *United States*, 287 U.S. 206 11

Sibron v. *New York*, 392 U.S. 40 6

Spinelli v. *United States*, 393 U.S. 410 10

Terry v. *Ohio*, 392 U.S. 1 ..... 5, 6

United States v. *Benjamin*, No. 80-2143 (7th Cir. Mar. 26, 1981) 9

United States v. *Brignoni-Ponce*, 422 U.S. 873 5

United States v. *Chadwick*, 433 U.S. 1 9

United States v. *Cortez*, No. 79-404 (Jan. 21, 1981) 4, 5

PREVIOUS PAGE WAS BLANK

Page

Cases—(Continued):

United States v. *Dominguez*, 615 F. 2d 1093 10

United States v. *Dunloy*, 584 F. 2d 6 10

United States v. *Elmore*, 595 F. 2d 1036, cert. denied, 447 U.S. 910 7

United States v. *Harris*, 403 U.S. 573 10

United States v. *Klein*, 626 F. 2d 22 9

United States v. *Louderman*, 576 F. 2d 1383, cert. denied, 439 U.S. 896 10

United States v. *Mendenhall*, 446 U.S. 544 ..... 5, 6, 7

United States v. *Moreno*, 569 F. 2d 1049, cert. denied, 435 U.S. 972 11

United States v. *Muckenthaler*, 584 F. 2d 240 10

United States v. *Van Leeuwen*, 397 U.S. 249 8

United States v. *Wylie*, 569 F. 2d 62 7

Constitution and statute:

United States Constitution, Fourth Amendment 4, 6, 7, 8

21 U.S.C. 841(a)(1) 1

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1344

TRACEY VIEGAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 639 F. 2d 42.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on January 8, 1981. The petition for a writ of certiorari was filed on February 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to two years' imprisonment, with all but six months of that sentence suspended, and to a two-year special parole term. The court of appeals affirmed (Pet. App. 1a-14a).

The evidence adduced at a suppression hearing showed that during the night of November 6-7, 1979, two DEA agents assigned to Logan Airport in Boston, Massachusetts, observed Robert Brooks inquire where luggage from a flight from Miami could be retrieved. After parking his automobile near the luggage claim area, Brooks entered a phone booth, evidently to place a call, but kept the booth door open and nervously peered outside (Pet. App. 1a-2a; Tr. 61-66).[1] When petitioner deplaned, Brooks met him, and the two men entered adjoining phone booths. They kept the phone booth doors open, looking up and down the corridors and appeared to the agents to be talking with one another.[2] The agents, one of whom had 14 years' drug enforcement experience, viewed these actions as "consistent with activity that is displayed by drug couriers * * * to identify surveillance" (Pet. App. 2a; Tr. 66-69, 72-73, 78).

The agents then followed petitioner and Brooks to the baggage carousel and observed them alternately turn and look about as they walked (Pet. App. 2a; Tr. 70-73). Petitioner obtained his suitcase and began walking with Brooks toward the parking lot. At that point one of the agents joined them, identified himself and stated that he wished to speak with petitioner for a moment. Without objection, petitioner answered questions concerning the origin and purpose of his trip and showed the agent his ticket stub and his driver's license (Pet. App. 2a-3a; Tr. 35-40). When one of the agents asked petitioner whether he had drugs in his suitcase, petitioner paled, his hand shook, and he began to perspire although it was a cold night. After petitioner responded in the negative, the agent falsely stated that the

---

[1]"Tr." refers to the two volume transcript of the suppression hearing.

[2]The agents testified that neither man put any coins into the phones, although telephone records showed that Brooks made a collect call to his home (Pet. App. 2a & n.1).

DEA had received information from Miami regarding someone seen there matching petitioner's description and carrying a valise.[3] The agent then asked petitioner if he would open his bag but advised him that he need not do so. Petitioner refused to open the bag but agreed to let a detector dog sniff it and then agreed to accompany the agents to the DEA airport office to inquire about a dog. After it developed that no dog would be available for four hours, petitioner was told that he was free to leave, but that his bag would be detained. He then departed, leaving the bag (Pet. App. 3a; Tr. 40-50, 77-80).

Later, the same day, the agents applied for a warrant to search the contents of the bag. In addition to detailing the events of the previous night, the affidavit in support of the warrant application (Pet. App. 18a-20a) also contained additional information revealed by a check of the files. A confidential informant, who had provided information in the past that had been independently corroborated by DEA agents, had advised the DEA that petitioner dealt in cocaine and that the informant had purchased some cocaine from him in 1978. The informant had also reported that he had observed petitioner in 1978 with large quantities of cocaine brought in from Florida. The affidavit also stated that in 1978 the DEA had received information from a local policeman that petitioner was planning to transport a large quantity of cocaine from Florida to Massachusetts. The magistrate issued a search warrant, and the ensuing search revealed 290 grams of cocaine in the luggage (Pet. App. 1a, 6a-7a).

---

[3]Petitioner was aware, however, that this information could not have pertained to him because he carried no valise in Miami, having checked it through directly from Marathon, Florida, to Boston (Pet. App. 3a n.2; Tr. 44).

Prior to trial, petitioner moved to suppress this evidence on the ground that he and his suitcase had been detained illegally and that there was no probable cause to support the issuance of the search warrant. After a hearing, the district court denied the motion (Tr. 2-131).

The court of appeals noted (Pet. App. 3a-4a) that it was unclear whether, or when, petitioner was seized by the agents but found it unnecessary to resolve that question because, even assuming that a seizure occurred at the initial contact, "the agents' conduct satisfied the Fourth Amendment's test of reasonableness" (*id.* at 5a). The court also held that the agents' reasonable suspicion of criminal activity provided a sufficient basis to detain petitioner's luggage pending the acquisition of a search warrant (*id.* at 6a). Finally, it held that the "cumulative effect" of the information contained in the affidavit—the agents' observations at the airport together with the information concerning petitioner's cocaine smuggling activities during the preceding year—was sufficient to establish probable cause for issuance of a search warrant (*id.* at 6a-8a). Judge Bownes dissented on the ground that the agents did not have reasonable suspicion sufficient to detain petitioner for a brief investigation (*id.* at 8a-14a).

ARGUMENT

1. Petitioner contends (Pet. 12-15) that the DEA agents violated his Fourth Amendment rights by seizing him without reasonable grounds to suspect him of criminal activity. This contention is without merit. The court of appeals correctly decided this issue, and, in any event, this fact-bound issue does not warrant review by this Court.

Law enforcement officials are empowered to conduct brief investigatory stops where there is "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States* v. *Cortez*, No. 79-404 (Jan. 21, 1981), slip op. 5. See also, *e.g.*, *United*

States v. *Brignoni-Ponce*, 422 U.S. 873, 878-883 (1975); *Terry* v. *Ohio*, 392 U.S. 1, 16-19 (1968). The totality of the circumstances is to be taken into account in determining whether the officers have a reasonable basis for suspicion. *United States* v. *Cortez, supra*, slip op. 6. And in making this determination, law enforcement officers are entitled to assess the facts in light of their specialized knowledge and experience, which may permit them to make deductions that would elude an untrained observer. *Ibid.*; *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979).

Under these principles, assuming *arguendo* that petitioner was seized when first contacted by the agents, their observations provided reasonable suspicion of criminal activity sufficient to justify a brief investigatory stop, as both courts below held. Prior to their encounter with petitioner, the agents overheard Brooks inquire concerning the arrival of a flight from Miami, which is known to be a major source of cocaine. They observed Brooks peer nervously up and down the concourse while appearing to place a call from a phone booth. When Brooks met petitioner, both men repeated this apparent effort to detect surveillance by using adjacent phone booths as lookout posts from which to survey the concourse, while appearing to talk with each other rather than on the phone. When the two men proceeded toward the luggage area, they took turns looking behind them several times "as though they were looking for somebody" in a manner that the agents had seen used before by drug couriers in an attempt to detect surveillance (Tr. 69).[4] Here, the circumstances of a late night arrival from Miami, while not grounds for particularized suspicion in

---

[4]The experience of trained agents comes into play particularly in recognizing the "characteristics of persons engaged in * * * illegal practices" and "the behavior of a suspect who appears to be evading police contact." See *United States* v. *Mendenhall*, 446 U.S. 544, 563-564 (1980) (Powell, J., concurring).

and of itself, heightened the possibility that a drug delivery was taking place. When the agents observed petitioner and Brooks engage in series of activities that indicated an attempt to detect surveillance, their suspicious were raised to a level that justified the minimal intrusion involved here.[5]

In any event, we submit that petitioner was not "seized" within the meaning of the Fourth Amendment when he was first contacted by the agents. Although they declined to decide the question, both the majority (Pet. App. 3a-4a) and the dissent (*id.* at 8a) recognized that it was not clear that a seizure occurred here, and the majority explicitly rejected the district court's intimation that a seizure within the meaning of the Fourth Amendment occurs simply because a policeman can reasonably expect a citizen to stop when a question is posed to him. As explained in *United States* v. *Mendenhall*, 446 U.S. 544, 553 (1980) (opinion of Stewart, J.), "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." See also *Terry* v. *Ohio*, *supra*, 392 U.S. at 19 n.16; *Sibron* v. *New York*, 392 U.S. 40, 63 (1968).

Here, as in *Mendenhall*, the agents' initial approach to petitioner would not have led a reasonable person to believe that he was not free to leave. The agents had no uniforms or

---

[5]Petitioner mistakenly contends (Pet. 15), that *Reid* v. *Georgia*, No. 79-448 (June 30, 1980), compels the conclusion that the agents lacked reasonable suspicion here. As in this case, the suspects in *Reid* arrived on a late night flight from a major narcotics source city. But here, as the court of appeals noted (Pet. App. 6a n.5), the agents observed petitioner and Brooks make several different suspicious attempts to detect surveillance, both while walking in the concourse and while sitting in the adjoining phone booths. In *Reid*, by contrast, petitioner occasionally looked backward at his companion, but there was no evidence that he ever took any actions calculated to detect surveillance.

weapons and made no effort to detain petitioner. An agent simply joined petitioner and Brooks as they were walking down the concourse, requested "a moment" to talk with them, and asked for identification. Petitioner complied with this request without any objection and voluntarily responded to questions concerning his identity, his point of origin and the purpose of his trip. "In short, nothing in the record suggests that [petitioner] had any objective reason to believe that [he] was not free to end the conversation in the concourse and proceed on [his] way * * *." *United States* v. *Mendenhall, supra*, 446 U.S. at 555 (opinion of Stewart, J.); see also *United States* v. *Elmore*, 595 F. 2d 1036, 1042 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *United States* v. *Wylie*, 569 F. 2d 62, 68 (D.C. Cir. 1977).[6]

The court of appeals suggested that the protections of the Fourth Amendment may have been implicated when the agents asked petitioner to accompany them to the DEA office without returning his driver's license, referring to this event as "a possible watershed point in the seizure question" (Pet. App. 4a n.3). Assuming that the seizure occurred at this point,[7] the agents had by then acquired additional grounds for suspicion sufficient to detain petitioner briefly for investigative purposes, as a result of petitioner's extremely nervous reaction to the agents' questions about drugs. In short, the agents' encounter with petitioner did not violate his Fourth Amendment rights.

---

[6]The agent testified at the suppression hearing that, if petitioner had refused to stop, he would have been permitted to continue on his way with his luggage (Tr. 42).

[7]Petitioner voluntarily agreed to go to the office. While he would not wish to leave the airport without his driver's license (cf. *United States* v. *Elmore*, *supra*, 595 F. 2d at 1042), there is no reason why petitioner should not have felt free to inform the officer that he wished to leave and to request the return of his license.

2. Petitioner's contention (Pet. 16-20) that his Fourth Amendment rights were violated by detention of his luggage overnight pending further investigation and issuance of a search warrant is similarly without merit. The agents acted reasonably at all times and performed no search at all until a search warrant had been secured.

In *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), this Court held that police were authorized to detain briefly mail packages reasonably suspected of containing contraband. When additional information established probable cause, the agents secured a warrant and searched the packages. Noting that the circumstances that gave rise to the police's suspicion "certainly justified detention, without a warrant, while an investigation was made" (397 U.S. at 252), the Court explained (*id.* at 252-253):

> The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right "to be secure" in the "persons, houses, papers, and effects" protected by the Fourth Amendment against "unreasonable searches and seizures."
>
> * * * * *
>
> The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

Similarly here, petitioner's privacy interest in the contents of his luggage was not invaded until a search warrant was obtained from a magistrate. Given the agents' reasonable suspicion that the suitcase contained narcotics, they acted reasonably in detaining it overnight in order to obtain a detection dog and for further investigation; the alternative would have been to allow petitioner to dispose of the contraband. The limited inconvenience to petitioner of having

his luggage detained for a few hours was justified, as in *Van Leeuwen*, by the facts that gave rise to the agents' suspicion. See *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.12 (1979).[8] As petitioner recognizes (Pet. 16), the Seventh Circuit has held on facts indistinguishable from those here that police may detain a suitcase for further investigation when they reasonably suspect that it contains contraband. *United States* v. *Klein*, 626 F. 2d 22, 25-26 (1980). As the court of appeals explained in *Klein*, the privacy interest in the contents of the suitcase was not invaded by the detention but rather was safeguarded by obtaining a warrant before the search. 626 F. 2d at 26. See also *United States* v. *Chadwick*, 433 U.S. 1, 13-14 n.8 (1977); *United States* v. *Benjamin*, No. 80-2143 (7th Cir. Mar. 26, 1981), slip op. 6-9.[9]

3. There is likewise no merit to petitioner's contention (Pet. 20-34) that the affidavit was insufficient to support the issuance of a warrant to search the suitcase. As the court of appeals concluded (Pet. App. 8a), "the cumulative effect [of the agents' observations and the information furnished during 1978 by the informant] was to establish probable cause to search [petitioner's] bag." The district court, the majority

---

[8]Petitioner was not in the midst of a journey, but was simply going home from the airport. He was told that he could pick up his bag after it had been sniffed by a dog (Tr. 47).

[9]Neither *Chadwick* nor *Arkansas* v. *Sanders*, *supra*, lends support to petitioner's claim. Both cases concern the requirement of a warrant for the greater intrusion of examining the contents of luggage. The agents complied with that requirement here. Indeed, both *Chadwick* and *Sanders* clearly suggest that police may maintain the status quo through temporary detention of unopened luggage while seeking a search warrant. *United States* v. *Chadwick*, *supra*, 433 U.S. at 13-14; *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764 n.12. Similarly, the agents fully complied with *Dunaway* v. *New York*, 442 U.S. 200 (1979). Because such an extended detention of a person would be unreasonable in the absence of probable cause, petitioner was allowed to go home when the luggage was detained. Since this case does not involve detention of petitioner's person, there is no need to hold it pending disposition of *Michigan* v. *Summers*, No. 79-1794 (argued Feb. 25, 1981).

and the dissent below all agreed on this fact-bound conclusion, and review by this Court is accordingly unwarranted.

In particular, petitioner contends (Pet. 21-27) that the affidavit did not comply with the requirements of *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *Aguilar* v. *Texas*, 378 U.S. 108 (1964), because it failed to disclose the reason why the agent concluded that the informant was reliable and the basis upon which the informant determined that petitioner had been involved in trafficking in cocaine. But the affiant's statement (Pet. App. 20a) that the informant had previously furnished the DEA with reliable, independently corroborated information fully satisfied the reliability component of the *Aguilar* test. See, *e.g.*, *United States* v. *Dominguez*, 615 F. 2d 1093, 1096 (5th Cir. 1980); *United States* v. *Muckenthaler*, 584 F. 2d 240, 244 (8th Cir. 1978); *United States* v. *Louderman*, 576 F. 2d 1383, 1389 (9th Cir.), cert. denied, 439 U.S. 896 (1978).[10] And the informant's statement (Pet. App. 20a) that he had purchased cocaine from petitioner and had observed him with large quantities of cocaine brought in from Florida clearly established that the information was based on the informant's personal knowledge. See, *e.g.*, *United States* v. *Harris*, 403 U.S. 573, 578-579 (1971) (plurality opinion).[11]

---

[10]Moreover, the fact that the informant's admission that he had purchased cocaine from petitioner was against his penal interest furnished an additional basis for crediting his tip. See, *e.g.*, *United States* v. *Harris*, 403 U.S. 573, 583 (1971) (plurality opinion); *United States* v. *Dunloy*, 584 F. 2d 6, 10 (2d Cir. 1978).

[11]The affidavit did not specifically state how the informant knew that the cocaine he observed in petitioner's possession came from Florida. But considering the affidavit as a whole, the clear implication of the informant's statements that he purchased cocaine from petitioner and observed cocaine in his possession was that he also learned the source of the cocaine as a result of his personal contacts with petitioner. In addition, the informant's statement that Florida was the source of the cocaine he observed was corroborated by other information in the affidavit that the local police had learned from an unidentified source that petitioner was planning to transport cocaine from Florida to Massachusetts.

Contrary to petitioner's contention (Pet. 28-33), the fact that the informant's knowledge of petitioner's drug dealings was a year old does not mean that it should not be considered in deciding whether the affidavit established probable cause. While it is true that the affidavit supporting the search warrant must establish probable cause at the time of the search (see, *e.g.*, *Sgro* v. *United States*, 287 U.S. 206, 210 (1932)), that requirement was satisfied here. The function of the 1978 information was not directly to furnish probable cause that petitioner was carrying cocaine in the airport on November 6, 1979, but to corroborate the agents' deductions based upon their observations of petitioner at that time. The agents' independent observations of petitioner's suspicious behavior gave them reason to suspect that he was smuggling narcotics. The subsequent discovery that petitioner was known to have dealt in cocaine in the recent past raised this suspicion to the level of probable cause.

Finally, petitioner's contention (Pet. 33-34) that the affidavit failed to demonstrate any nexus between his suitcase and the cocaine he was suspected of transporting is without foundation. "In considering the sufficiency of an affidavit of probable cause, only the probability of finding the described items at a particular location must be shown. Certainty is not required." *United States* v. *Moreno*, 569 F. 2d 1049, 1053 (9th Cir.), cert. denied, 435 U.S. 972 (1978). Here, the suitcase was the only item petitioner was carrying when he proceeded out of the terminal, its retrieval at the baggage carousel was accompanied by apparent efforts to detect police surveillance, and petitioner appeared extremely nervous while awaiting a detection dog who would sniff the suitcase for contraband. These facts fully supported the conclusion that the cocaine petitioner was suspected of transporting was probably contained in the suitcase.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOHN F. DEPUE
Attorney

APRIL 1981

DOJ-1981-04